THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1210

RICHARD H. OLSEN,

Petitioner

v.

SAUL GOODMAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

John W. Pruaty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 32130

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THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on the 7th day of November, 1974, and an order denying a petition for rehearing entered on January 29, 1975.

OPINIONS BELOW

The Final Judgment of the Circuit Court of Dade County, Florida, dated March 17, 1972, was not reported, but is printed

at Appendix A hereto.

The Order of the District Court of Appeal, Third District, dated November 17, 1972, dismissing the Appeal, is reported in 269 So.2d 782, and is printed at Appendix B hereto.

The Opinion of the Supreme Court of Florida, dated May 9, 1973, reversing the District Court of Appeal and reinstating the Appeal is reported in 278 So.2d 612, and is printed at Appendix C hereto.

The Opinion of the District Court of Appeal, Third District, dates March 12, 1974, affirming the final judgment of the Circuit Court of Dade County, *per curiam*, is reported in 291 So.2d 71 and is printed at Appendix D hereto.

The Opinion of the Supreme Court of Florida, dated November 7, 1974, reversing the District Court of Appeal, is reported in 305 So.2d 753, and is printed at Appendix E hereto.

The Order of the Supreme Court of Florida, dated January 29, 1975, denying a rehearing, is not reported, but is printed at Appendix F hereto.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on November 7, 1974. A petition for rehearing was denied on January 29, 1975. An Order Extending Time To File Petition For Writ of Certiorari to and including June 27, 1975, was entered on April 12, 1975.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 2101(c).

THE QUESTIONS PRESENTED

1. Does the decision of the Supreme Court of Florida, conferring upon itself jurisdiction in this cause, under Article V, Section 3(b)(3) of the Constitution of the State of Florida, where no such jurisdiction existed, conflict with the Fourteenth Amendment to the Constitution of the United States by denying Petitioner due process of law?

2. Does the decision of the Supreme Court of Florida

denying the standing of the Petitioner by its reversal of a jury verdict in favor of Petitioner, and the affirmance of said jury verdict by the *per curiam* decision of the District Court of Appeal of the State:

(a) Conflict with Articles One and Four of the Constitution of the United States by the Court's failure to give full faith and credit to the Laws of New York governing contracts, which laws were applicable in this cause?

(b) Conflict with the Seventh Amendment to the Constitution of the United States, which Amendment was adopted in full by Article One, Section Two of the Bill of Rights of the Constitution of the State of New York by denying Petitioner the right to trial by jury on the issue of usury?

(c) Conflict with the Fourteenth Amendment to the Constitution of the United States by the Court's refusal to give effect to a substantive defense, arising under contract, which defense is valid in the state wherein the contract was made and was performed?

STATEMENT

I. NATURE OF CASE:

This Petition grows out of an appeal to the Florida Supreme Court from the District Court of Appeal, Third District, reversing that Courts *per curiam* affirmance of the jury verdict in favor of the Petitioner rendered in the Circuit Court of Dade County, Florida.

II. PERSONS INVOLVED:

THE PETITIONER: Richard H. Olsen is a member of the Florida Bar having been admitted in 1957, and an investor.

THE RESPONDENT: Saul Goodman is a retired banker of forty years experience having been the Vice Chairman of the Board and Executive Vice President of the Gary Trust and Savings Bank of Gary, Indiana.

III. THIS CASE:

This cause involved an action at law on a contract dated September 17, 1968. Under the terms of the contract, Olsen, the defendant below and the Petitioner herein, was borrowing $150,000 to purchase 25,000 shares of the capital stock of Omega Equities Corporation. Goodman, the plaintiff below and the Respondent herein, was lending Olsen the money and depositing with him an additional $150,000 for the purchase of the same amount of stock for his personal account.

The contract between the parties provided the loan to Olsen would be repaid in eight (8) months and thirteen (13) days. It further provided that Goodman, the lender, as a consideration of the loan, had the right to demand that Olsen, the borrower, repurchase Goodman's stock at a profit of $100,000.

In addition to Goodman and Olsen, there were other individuals purchasing stock in Omega who had given their money to Olsen, as a trustee, for their purchases.

At the trial, it was disclosed that Olsen received a check payable to Richard H. Olsen, Trustee, from Goodman for $300,000. The check was endorsed in the presence of Goodman, by Olsen as Trustee, payable to Omega Equities Corporation for deposit only and subsequently delivered to Omega, in New York, with the combined funds of the other investors, for the purchase of the stock.

The day following the delivery of the funds to Omega and prior to the Goodman check clearing collection at his bank, Goodman called Olsen, who had returned to Florida, and advised him that he had stopped payment on the $300,000 check. Goodman demanded a payment of $25,000 before he would permit the check to be cleared. Olsen, to protect the funds of the other investors, negotiated the sum down to $10,000 and wired, by Western Union, Goodman the funds whereupon Goodman permitted his check to clear collection.

The written contract was prepared, signed and executed in the State of New York and there was no indication that performance would occur any place other than New York.

After maturity of the note, Olsen paid $50,000 of the $150,000 as demanded by Goodman but when he failed to

make a further payment, Goodman filed a lawsuit in the Circuit Court of Dade County, Florida. The first count of the lawsuit demanded the repayment of the $150,000 loaned and the second count sought damages for Olsen's alleged failure to buy back the stock from Goodman at the guaranteed price giving Goodman a profit of $100,000.

The principal defense interposed by Olsen to the lawsuit was that the contract was usurious under the applicable laws of the State of New York and, therefore, unenforceable. Goodman, in his Amended Answer, admitted the transaction occurred in New York and that the New York law should apply.

The case, after two days of trial before a jury, with the application of the laws of New York, resulted in a verdict for Olsen followed by a judgment thereon.

Goodman entered an appeal to the Third District Court of Appeal in Florida but failed to file a brief within the time prescribed by the Florida Rules of Appellate Procedure. Olsen filed his brief and two weeks later filed a motion to dismiss the appeal. At a hearing on the motion to dismiss, the motion was granted and the appeal dismissed.

Goodman then petitioned the Supreme Court of Florida for a writ of certiorari which writ was subsequently granted. A panel of the Supreme Court reinstated the appeal and remanded the cause to the District Court to be heard on its merits. The District Court of Appeal issued a *per curiam* affirmance of the jury verdict in favor of Olsen.

Subsequently, Goodman again sought a writ of certiorari from the Supreme Court on a claim of conflict of jurisdiction pursuant to Article 5, Section 3(b)(3) of the Constitution of the State of Florida. The conflict claimed was between the *per curiam* holding of the District Court of Appeal and the opinion in the *State of Florida, ex rel., the Florida Bar v. Delves*, 160 So.2d 114, and the *Florida Bar v. Pitts*, 219 So.2d 427, which cases are concerned entirely with an interpretation of the integration rules of the Florida Bar and not with the usury law of the State of New York.

A panel of the Supreme Court, with a dissenting opinion, granted certiorari on a conditional basis and subsequently reversed the District Court of Appeal. The Judgment of reversal

remanded the cause to the Circuit Court of Dade County for re-trial with directions prohibiting the interposition of the defense of usury.

A petition for rehearing was filed by Olsen. The Petition, in part, set forth the lack of jurisdiction of the Supreme Court to grant the writ of certiorari where no conflict existed with annexed hereto as Petitioner's Exhibit No. 3. The Petition, in part, set forth the lack of jurisdiction of the Supreme Court to grant the writ of certiorari where no conflict existed with respect to the laws of New York to give them jurisdiction. The Petition further set forth the denial of due process of law to Olsen by the prohibition of the use of the defense of usury and a jury trial as guaranteed by the Constitution of the State of New York. The Petition was denied on the 29th of January, 1975.

On April 10, 1975, Olsen filed a Motion for Extension of Time Within Which to File Petition for Writ of Certiorari to this Court. As grounds for the Motion, Olsen cited the impeachment proceedings being conducted by the House Select Committee on Impeachment, investigating three of the Florida Supreme Court Justices, all of whom had participated on the panels adjudicating the two Goodman-Olsen appeals. This Court granted the extension through June 27, 1975.

During the course of the impeachment hearings, Justice Dekel resigned from the Court and the Committee then concentrated its investigation on Justice McCain. It was Justice McCain who became the lead Justice in both Goodman appeals. Testimony and exhibits of record indicated irregularities in the Goodman-Olsen appeals. The confidential files of the Court revealed that, in the first Goodman appeal, case #43,168, it was initially assigned to Justice Ervin, who was to be the lead Justice in the case. A jurisdictional memorandum in the file recommended a denial of jurisdiction, but it had been crossed out. A second jurisdictional memorandum on reassignment, edited by Justice McCain, was next in the file and it recommended granting the writ without oral argument. Cases are normally assigned Justices on a blind selection basis. The second Goodman appeal, case #45,356, again had Justice McCain being the lead Justice. Prior to the Committee completing further investigation in this matter, Justice McCain

resigned from the Court, thus concluding the Committee's investigative power. The third Justice under investigation, Justice Boyd, rather than being impeached was referred to the Judicial Qualifications Commission for a mental examination and for determination of his capacity to continue on the Court. There is printed as appendices G, H and I the affidavit of the Staff Director of the Committee on Judiciary of the Florida House of Representatives and the confidential files of the Florida Supreme Court relating to the Goodman-Olsen appeals.

REASONS FOR GRANTING WRIT

As to question one, the Constitution of the State of Florida, as amended, Article V, Section 3(b)(3) provides that the Supreme Court:

> "(3) may review by certiorari any decision of a District Court of Appeal that affects a class of Constitutional or State Officers, that passes upon a question certified by a District Court of Appeal to be of great public interest, or that is in direct conflict with a decision of any District Court of Appeal or of the Supreme Court *on the same question of law*, and any interlocutory order passing upon a matter, which upon final judgment would be directly appealable to the Supreme Court; and may issue Writs of Certiorari to Commissions established by general law having statewide jurisdiction." (Emphasis supplied)

The Appellant below (Goodman) sought to have the Florida Supreme Court take jurisdiction of his petition for certiorari on the grounds of conflict. It is obvious then, from Article V, Section 3(b)(3) of the Florida Constitution that the Court must find a conflict *on the same question of law* which was enunciated by the *per curiam* decision of the District Court of Appeal, Third District, and the cases cited in Appellant's petition and brief.

The Florida Supreme Court has set forth, in numerous cases, what constitutes a conflict. In the case of *Nielsen v. City of Sarasota*, 117 So.2d 731 at 734, 735 (1960), said Court defined its limitation of Jurisdiction in stating:

> "Under Article V, Florida Constitution, as amended

effective July 1, 1957.[1] *the power of this Court to issue writs of certiorari was substantially restricted and drastically circumscribed*. While the Courts of Appeal and the Circuit Courts were endowed with unlimited authority to issue writs of certiorari within the orbit of their own jurisdiction, *the power of this Court to issue such writs, although unlimited prior to the amendment was subjected to substantial constitutional restraints when the amendment was adopted*. The so-called 'conflict jurisdiction' was not conveyed to the Supreme Court merely to convert it into a 'court of selected errors' whereby the Justices of this Court could whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of this Court.

"On the contrary, *in order to sanctify the decisions of the Courts of Appeal with an aspect of finality*, so essential to prevent any imbalance in the several echelons of the appellate process, the jurisdiction of this Court to exercise certiorari powers and to set aside the decisions of the Courts of Appeal on the conflict theory was expressly limited by the Constitution itself. *Ansin v. Thurston*, Fla, 101 So.2d 808.

"When our jurisdiction is invoked pursuant to this provision of the Constitution, we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called 'justice of the case' as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory *we must find in that decision a real, live and vital conflict within the limits above mentioned*." (Emphasis supplied)

In the case of *Kyle* v. *Kyle*, 139 So.2d 885 at 887 (1962), the Florida Supreme Court said:

> "The test of our jurisdiction in such situations is not measured simply by our view regarding the correctness of the Court of Appeal decision. On the contrary, jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. *We have said that conflict must be of such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter.*" (Emphasis supplied)

[1] Article V, Florida Constitution was further amended in 1972. No change regarding conflict certiorari was made except to permit the Supreme Court to grant a writ where an opinion of a District Court of Appeal was in conflict with a prior opinion rendered by that District Court.

The Appellant below, in his petition and supporting brief for certiorari relied upon two cases: *State of Florida, ex rel. the Florida Bar v. Delves*, 160 So.2d 114 (1964) and *Florida Bar v. Pitts*, 219 So.2d 427 (1969), to support his contention that a conflict existed between the *per curiam* decision of the District Court of Appeal and the cited decisions of the Supreme Court of Florida.

The *Delves* and *Pitts* cases, *supra*, are wholly and completely involved with the construction and the interpretation of the Integration Rules of the Florida Bar Association. Neither case has the remotest relationship to, nor is it similar with the factual issues or the law presented in the case *sub judice*. Both cited cases involved disciplinary proceedings, initiated through the filing of a grievance with the Florida Bar Association, which grievance was governed by the Integration Rules of that Association. Those cases, being interpretations of quasi criminal administrative regulations, are not applicable in an action at law governed by the Statutes of a sister state.

In the case *sub judice*, the litigants agreed the laws of the State of New York were applicable. This was confirmed by the Trial Court, confirmed by the District Court of Appeal and further confirmed by the Panel of the Supreme Court of Florida in its Opinion rendered November 7, 1974.

It is obvious that decisions rendered by the Florida Supreme Court in matters involving disciplinary proceedings under the administrative regulations of the Integration Rules of the Florida Bar Association cannot be used to establish a "conflict" as required by Article V, Section 3(b)(3) of the Constitution of the State of Florida in an action at law under the laws of the State of New York.

The cited cases of *Delves* and *Pitts*, *supra*, have no application whatsoever, to the law in the matter tried below. No conflict of any kind exists between the *per curiam* Order of the District Court of Appeal and the cases relied upon by the Appellant below. The Panel of the Florida Supreme Court, therefore, lacked the power to confer upon itself jurisdiction in this case under the provisions of Article V, Section 3(b)(3) of the Constitution of the State of Florida. The exercise of such illegally assumed jurisdiction by said Court has denied Petitioner equal protection and due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

As to question number two, the law of the state where the contract was made will generally be applied in the forum to the exclusion of the law of the forum. This is especially so when the law of the place of contracting is asserted as a defense to an action brought in another forum.

In the case of *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 at 160 (1932), this Court, with respect to the enforcement of a right conferred by a statute of another state, drew a distinction between a case where the right asserted is sought to be affirmatively enforced and a case where the right asserted is pleaded as a defense. The case involved an action for death by wrongful act brought in New Hampshire. By way of affirmative defense, the defendant pleaded that the remedy sought was not provided for by the terms of the Vermont Workmen's Compensation Statute.

The plaintiff contended that the provisions of the Vermont Workmen's Compensation Statute which forbade resort to common-law remedies was contrary to the public policy of New Hampshire, where the action was instituted, because the New Hampshire statute allowed an election of remedies, and that, accordingly, the full faith and credit clause did not require New Hampshire Courts to enforce a statute of another state which was obnoxious to its public policy. In sustaining the defense of the employer that the rights of the employee were confined to those prescribed by the Vermont statute, the Court said:

"It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies. Thus, a *plaintiff* suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy ... or because it fails to provide procedure appropriate to its determination ... or because the enforcement of the right conferred would be obnoxious to the public policy of the forum ... But the *company* (the employer) *is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another state*. The right which it claims should be given effect is set up by way of defense to an asserted liability; and *to a defense different considerations apply*. ... A state may, on occasion, decline to enforce a foreign cause of action. In so doing it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But *to refuse to give effect to a substantive defense under the applicable laws of another state*, as under the circumstances here presented, *subjects the defendant to irremediable liability. This may not be done.*" (Emphasis supplied)

The rationale of the *Bradford* case, *supra*, was followed in the case of *Holderness, et al., v. Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F.Supp. 145 (1944). Plaintiffs, citizens of North Carolina, sued on an insurance policy issued by a New York corporation covering a building in North Carolina. The contract was neither executed nor delivered in Florida, nor was it performed there. The action being transitory, was commenced in a Florida state court and subsequently removed to the Federal District Court. The suit was instituted more than twelve months after the fire. Defendant asserted the suit was barred by a contract provision that no action thereon shall be sustainable in any court unless commenced within twelve months next after the fire. Plaintiff replied that in Florida this provision is contrary to public policy and therefore unenforceable. The Court, in finding for the defendant said:

"A state can not extend the effect of its laws beyond its

own borders so as to destroy or impair contract rights not operative within its own jurisdiction, and valid where made. *When defensively asserted, foreign contract rights must be recognized by the local forum even though contrary to local public policy, if such rights are valid, and performance is to be had, where the contract was executed.* To decline to recognize such rights for defensive purposes in the local forum effectively deprives the party of a right valid where made and to be performed. *If he can not assert it is a defense, the right is wholly lost to him. Thus the contract obligation, valid where made and to be performed, is impaired, contrary to Art. 1, Sec. 10, of the Federal Constitution. Due Process and full faith and credit in its enforcement are denied, contrary to Sec. 1 of the 14th Amdt, and Art. 4, Sec 1, of the Constitution.*" (Emphasis supplied)

See also *Hartford Accident & Indemnity Co., v. Delta & Pine Land Co.*, 202 U.S. 143 (1934); *Home Insurance Company v. Dick*, 281 U.S. 397 (1930); and *John Hancock Mutual Insurance Company v. Yates*, 299 U.S. 178 (1936).

The panel of the Supreme Court of Florida, in reversing the *per curiam* affirmance by the District Court of Appeal, of a jury verdict in favor of the Appellant herein, chose to totally disregard the application of New York law and, in fact, took a position contrary to the position established in the Florida case of *Confederation Life Association v. Ugalde*, 151 So.2d 315 at 318 (1963), where the Court said:

"When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a *defense lawfully vested under the law of the latter jurisdiction may not be ignored by the forum* if that state had no significant connection with the contract obligations. *Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States* and Section 12 of the Declaration of Rights of Florida, F.S.A., *Home Ins. Co. v. Dick*, 281 U.S. 307, 50 S.Ct.338, 74 L.Ed. 926, 74 A.L.R. 701 (1930); *Hartford Accident & Indemnity Co., v. Delta Pine & Land Co.*, 292 U.S. 143, 54 S.Ct. 634 78 L.Ed. 1178, 92 A.L.R. 928 (1934); *Holderness v.*

Hamilton Fire Ins. Co. of New York, S.D.Fla. 1944, 54 F.Supp. 145 . . ." (Emphasis supplied)

Thus, the failure of the Florida Supreme Court to allow an asserted defense, valid in the state where the contract was made and performed, to be utilized in the Courts of the State of Florida, flies in the face of all established precedents of the Courts of the United States, the State of New York and the State of Florida itself.

The State of New York has adopted the Seventh Amendment to the Constitution of the United States[2] as its law regarding the right to trial by jury.

"Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provisions shall remain inviolate forever; . . ." *Article I, Bill of Rights, Section 2, Constitution of the State of New York*.

This premise is further defined in the case of *Edward F. Fedoryszyn, v. Leonard Weiss and Fedoryszyn Associates*, 310 N.Y.S.2d 55, at 58, (1970), 62 Misc.2d 889, where, in a stockholders derivative action the Court said:

"The existence in the complaint of a request for equitable relief does not destroy the right to a trial by jury where judgment for a sum of money is sought (*Vinlis Construction Co., Inc., et al. v. Roreck*, 23 A.D.2d 895, 260 N.Y.S.2d 345). *The right to a jury trial preserved by Amendment Seven to the United States Constitution is guaranteed by our State's Constitution. (Article I, Section 2).*" (Emphasis supplied)

In *McKinney's Consolidated Laws of New York – Civil Practice Law & Rules*, Volume 7B, Rule 4101, providing for trial by jury, states:

"In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived . . .
1. an action in which a party demands and sets forth facts

[2]"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Constitution of the United States, Seventh Amendment*.

which would permit a judgment for a sum of money only: . . ."

See also *Ruth H. Davis, as Executrix of the Estate of Lucy H. Mackey, Deceased v. Prudential Insurance Company of America*, 297 N.Y.S.2d 261 (1969) 31 A.D.2d 865; and *Schenck v. Prudential Ins. Co.*, 3 N.Y.S.2d 856 (1938), 167 Misc. 282, where the Court said that the right to a jury trial is a substantial constitutional right not within the discretion of the judge.

This Court, in the case of *Beacon Theatres, Inc. v. Hon. Harry C. Westover*, 359 US at 501 (1958), granted certiorari because, as it stated:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick v. Schiedt*, 293 US 474, 486; 79 L.Ed 603, 611, 55 S.Ct. 296, 95 ALR 1150, 36 NCCA 184." (Emphasis supplied)

Inherent in the principle of law laid down by this Court in *Bradford Electric*, *supra*, is the rationale that protects a citizen from deprivation of his right of defense when a party brings an action against him in a state where the citizen's protection, under a contract, may not exist. The law is clear on this point and has been universally followed by the Federal Courts, The Florida Courts and the Courts of New York.

The factual situation in the case *sub judice*, aptly demonstrates the rationale of *Bradford Electric*, *supra*. There is a contract. There is no dispute that the contract was drafted, executed and performed in the State of New York. There was an action for enforcement of the contract brought in the State of Florida, which if successful, would result in a judgment for money only, and, there was asserted an affirmative defense in the action, which defense is valid under the laws of the State of New York. There could be no clearer picture of the facts and the law, as hereinbefore set forth, to illustrate to this Court the error committed by the Florida Supreme Court thereby denying the Petitioner equal protection and due process of law

guaranteed him under the Constitution of the United States.

The Panel of the Florida Supreme Court went even further in this case. Not only did the Court deprive the Petitioner of his Constitutional rights to assert a defense on the contract, but it conferred upon itself jurisdiction in circumstances where its jurisdiction was prohibited under Article V, Section 3(b)(3) of the Florida Constitution.

The attention of the Court is directed to the fact that the law applicable in the case *sub judice*, is the law of contracts governed by the Statutes of New York. This is the law in the Court below. That this is the law is not now, nor ever has it been in dispute. Irrespective of this fact, the Appellant below founded his claim of conflict on the cases of *Delves* and *Pitts*, *supra*, which cases construe the Integration Rule of the Florida Bar Association. These are administrative regulations which govern disciplinary proceedings, *quasi*-criminal in nature, having a right of appeal to the Florida Supreme Court. They are regulations which are relevant only to Florida proceedings. How then, can the Florida Supreme Court compare these administrative regulations to the Statutes of New York? The answer is obvious, they cannot and that, therefore, no conflict exists. The case *sub judice* is governed by statutory laws passed by the legislature of New York, not by Integration Regulations propounded by the Florida Supreme Court. To permit the Florida Supreme Court to place the Integration Regulations of the Florida Bar Association on a par with the Statutes of the State of New York in an effort to obtain jurisdiction in this cause is to make a mockery of the Constitution of the United States and the statutes of the State of New York.

Equally as important as the law and the facts set forth herein is consideration by this Court of the atmosphere surrounding certain members of the Florida Supreme Court. As a result of impeachment proceedings by the Select Committee on Impeachment of the House of Representatives of the State of Florida, and the testimony and exhibits developed at the hearings, two of the Justices who sat in determination of the cases below resigned from the Court and a third Justice was referred to the Judicial Qualifications Commission for a mental examination to determine his competency to continue on the Court.

Sworn testimony taken at the impeachment hearings, which hearings were subsequent to the final determination of this case, showed serious irregularities on the part of Justices concerned with this case (Appendix G, H, and I). Further investigations were being made as to such irregularities but resignations of the concerned Justices terminated the investigation and the Petitioner is left with circumstantial evidence as to irregularities occurring in the instant case.

It is neither a pleasant nor an easy task to challenge the motives and integrity of certain members of the Florida Supreme Court. However, a combination of events in the instant proceeding compels, reluctantly, the raising of these questions. Examination of that Court's actions in conferring upon itself jurisdiction where jurisdiction should have been declined; of the Court's failure to apply the established law to the facts of the case; and of the revelation of irregularities of proceedings in this cause adduced from testimony at the impeachment hearings: all point to the single conclusion that the Petitioner has been denied a fair and impartial hearing on appeal and has thus been denied his rights under the Constitution of the United States.

CONCLUSION

To summarize, the Court now has for consideration a case in which the Florida Supreme Court seized jurisdiction in a situation where it was powerless to grant certiorari under Article V, Section 3(b)(3) of the Constitution of the State of Florida, as amended.

Having erroneously granted itself power of review, the Court then, while proclaiming that the case was governed by the law of the State of New York, failed to give full faith and credit to the laws of that State by substituting itself for the jury below as the trier of facts and by denying the Petitioner the right to assert, as an affirmative defense, the defense of usury, rights guaranteed to the Petitioner under the New York law.

In so doing, the Florida Supreme Court has violated Petitioners rights under Articles One and Four of the Constitution of the United States and under Amendments Seven and Fourteen of said Constitution. For such reason, we respectfully

urge that this Court grant certiorari.

Respectfully submitted,

Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

/s/ John W. Prunty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 33130

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 70-2149 (Williams)

SAUL GOODMAN,	:	
Plaintiff,	:	*FINAL JUDGMENT*
vs.	:	*FOR DEFENDANT*
RICHARD H. OLSEN,	:	
Defendant.	:	

Pursuant to the verdict of the Jury rendered upon the trial of this action, it is

ORDERED and ADJUDGED that plaintiff, SAUL GOODMAN, take nothing by this action and that the defendant, RICHARD H. OLSEN, go hence without day and that he shall recover costs from the plaintiff, to be taxed at a later date by this Court.

DONE and ORDERED at Miami, Florida this 16th day of March, 1972.

Circuit Judge

APPENDIX B

Not final until time expires to file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972
FRIDAY, NOVEMBER 17, 1972

SAUL GOODMAN, **
Appellant, **
vs. ** CASE NO. 72-798
RICHARD H. OLSEN, **
Appellee. **

This cause having come on for hearing upon appellee's motion to dismiss appeal and appellant's motion to file appellant's brief, and the court having considered same, it is ordered that appellant's motion to file brief is denied, appellee's motion to dismiss is granted and this appeal from the Circuit Court of Dade County, Florida (#70-2149) be and the same is hereby dismissed.

A True Copy
ATTEST:

/s/ Clerk District Court of Appeal, Third District

cc: Prunty, Ross, DeLoach & Olsen
Ragano & LaPorte
Gene Williams
E. B. Leatherman
/h

APPENDIX C

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973

SAUL GOODMAN, :
Petitioner, :
v. : CASE NO. 43,168
RICHARD H. OLSEN, :
Respondent. :
:

Opinion filed May 9, 1973
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield; and Harold D. Lewis of Lewis & Lewis, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach & Olsen, for Respondent

McCAIN, J.

This cause is before us on petition for writ of certiorari to review an order of the District Court of Appeal, Third District, reported at 269 So. 2d 762, which conflicts with Hector Supply Co. v. Carter, 122 So. 2d 22 (Fla. App. 3rd, 1960). We have jurisdiction pursuant to Fla. Const., Article V, Section 3(b)(3) (1973).[1]

On June 23, 1972, the appellant (petitioner here and plaintiff in the trial court) filed his notice of appeal in the District Court of Appeal, Third District, from an adverse judgment of the Circuit Court of Dade County. Difficulties in the prosecution of the appeal arose when, on September 23, 1972, appellee filed his brief on the merits with the District Court prior to the submission of appellant's brief. At the time

1. Under the new Article V, this Court may review by certiorari any decision of a district court of appeal "that is in direct conflict with a decision of *any* district court of appeal or of the supreme court on the same question of law. . ." Fla. Const. Article V, Section 3(b)(3) (1973).

of filing his brief, however, appellee made no motion to dismiss the appeal for failure of appellant to submit a brief.

On October 19, 1972, appellee moved to dismiss because of appellant's failure to comply with Rule 3.7a, F.A.R. Thereupon, on November 2, 1972, appellant filed a motion for leave to file his brief and explain his delay with supporting affidavits. Both motions were heard by the Court on November 13, 1972, at which time appellant filed his brief at the Court's suggestion.

On November 17, 1972, the District Court entered its order denying appellant's motion for leave to file his brief and granted appellee's motion to dismiss. Certiorari to this Court followed.

In the case cited for conflict, *Hector Supply Co. v. Carter, supra*, appellant filed a brief which failed to conform to the requirements of Rule 3.7f(4), F.A.R. Subsequently, appellee filed his brief and in it also argued that the appeal should be dismissed because of appellant's failure to conform to the appellate rules. The District Court concluded that the motion to dismiss was untimely, observing:

> "... No motion was presented to this court to require the appellant to file a brief in conformity with the rules or suffer a dismissal of its appeal. The appellee chose to wait until the filing of his brief and therein argued that the appeal should be affirmed because of the violation of the rule. Such an objection is untimely."

A similar situation exists in the instant case. Sub judice, appellee filed his brief on September 23, 1972 but made no motion to dismiss until nearly a month later. In these circumstances, it is our judgment that the objection was untimely and that the District Court abused its discretion in dismissing the appeal.

Accordingly, certiorari is granted, the order of the District Court of Appeal, Third District, is quashed and the cause remanded to that Court with directions that the appeal be reinstated.

It is so ordered.

ERVIN, Acting Chief Justice, ADKINS and DEKLE, JJ., Concur

BOYD, J., Dissents

APPENDIX D

To file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1974

PAUL GOODMAN,	**	
Appellant,	**	
vs.	**	CASE NO. 72-798
RICHARD H. OLSEN,	**	
Appellee.	**	

Opinion filed March 12, 1974.

An Appeal from the Circuit Court for Dade County, Gene Williams, Judge.

Leo Greenfield, for appellant.

Prunty, Ross, DeLoach & Olsen, for appellee.

Before BARKDULL, C.J. and CARROLL and HENDRY, JJ.

PER CURIAM

Affirmed. See: Busser v. Sabatasso, Fla.App.1962, 143 So.2d 532; Sharp v. Dixon, Fla.App.1971, 252 So.2d 805; DeKerwin v. First National Bank of Chicago, N.D. Ill.1959, *170 F.Supp. 112*; Knickerbocker Life Insurance Co. v. Nelson, 1897, *78 N.Y. 137*; Breunich v. Weselman, 100 N.Y. 609, *2 N.E. 385*; U. T. Hungerford Brass & Copper Co. v. Brigham, 47 Misc.Rep. 240, *95 N.Y.S. 867*; Empire Trust Co. v. Coleman, 85 Misc.Rep. 312, *147 N.Y.S. 740*; Bishop v. Rider, 235 A.D. 736, *255 N.Y.S. 787*; In Re Grottola's Estate, Sup.Ct.1953, *124 N.Y.S.2d 85*; Moore v. Plaza Commercial Corp., 9 A.D.2d 223, *192 N.Y.S.2d 770*; Equitable Life Assurance Society of the United States v. Kerpel, 38 Misc.Rep.2d 856, *238 N.Y.S.2d 1016*.

APPENDIX E

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN,	:	
Petitioner,	:	
v.	:	CASE NO. 45,356
RICHARD H. OLSEN,	:	DCA CASE NO.
Respondent.	:	72-798
	:	

Opinion files November 7, 1974

Writ of Certiorari to the District Court of Appeal, Third District

Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner

John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he

would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had

been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin, supra.*

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000 was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather

from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur
OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX F

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1975
WEDNESDAY, JANUARY 29, 1975

SAUL GOODMAN,		
Petitioner,	**	CASE NO. 45,356
vs.	**	THIRD DISTRICT
RICHARD H. OLSEN,	**	COURT OF APPEAL,
Respondent.	**	72-798

On consideration of the Petition for Rehearing filed by attorneys for respondent and reply thereto,

IT IS ORDERED that said petition is denied.

ADKINS, C.J., ROBERTS and McCAIN, JJ., and ERVIN, Ret. J., concur
OVERTON, J., dissents

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

By: Kay O. Yent
Deputy Clerk

Y
CC: Hon. W. P. Carter, Clerk
Hon. Gene Williams, Judge
Hon. John W. Prunty
Law Offices of Leo Greenfield
Hon. Frank Ragano

APPENDIX G

AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF LEON)

Before me this day personally appeared MARC H. GLICK, who, being duly sworn, deposes and publishes this statement:

1. I am the permanent Staff Director of the Committee on Judiciary of the Florida House of Representatives. During the impeachment investigation of Florida Supreme Court Justices Dekle, Boyd and McCain, I served as Staff Director and Associate Counsel for the House Select Committee on Impeachment, House of Representatives, State of Florida.

2. In my capacity as Staff Director and Associate Counsel, I was charged with investigating the conduct of the aforesaid Justices, and have personal knowledge of same.

3. Justice McCain sought to have the investigation relating to him enjoined by petitioning, first the Florida Supreme Court, and when denied, the United States District Court where it was also denied.

4. Justice McCain, through his counsel, refused to testify or appear before the Impeachment Committee, invoking the Fifth Amendment of the Constitution of the United States.

5. As part of the investigation of the Justices, but in particular that of Justice McCain, the Committee examined the cases of LOMBARDOSI vs WAINWRIGHT, Case Nos. 41,001 and 41,001A, GOODMAN vs. OLSEN, Case Nos. 43,168 and 45,356. In these cases Justice McCain was the assigned Justice and Mr. Frank Ragano, an Attorney from Tampa, Florida, represented a litigant on one side or the other in each case.

6. In the LOMBARDOSI case it was testified that Justice McCain called his aide, Anne Parker, from Tampa, Florida, to ask her to search the court records and advise him of the disposition of the LOMBARDOSI matter. Parker testified she checked the court record, called Justice McCain in Tampa and informed him that the Court had denied the LOMBARDOSI petition for habeas corpus and had denied a petition for re-hearing on the matter and further that Justice McCain had

voted with the majority, four to three, in both instances recommending denial. Parker further testified that a few days later an amended habeas corpus petition was filed and Justice McCain changed his vote and voted in favor of granting it. This petition was numbered 41,001A and Mr. Ragano was representing Lombardosi.

7. The GOODMAN vs. OLSEN cases were investigated to examine the irregularities which appear in the Supreme Court confidential records relating to the assignment of justices and the handling of procedures in the case. They were further used in developing the relationship between Appellant Goodman's Attorney, Frank Ragano, and Justice McCain.

8. The Supreme Court confidential records in the aforesaid cases became a matter of public record through the testimony of Sid White, Clerk of the Supreme Court, on April 16, 1975, and were marked Exhibit No. 10.

9. In case No. 43,168 the records show the case had been originally assigned to Justice Ervin. For reasons unknown and not part of the record, the case was reassigned to Justice McCain. The record contained a document on DETERMINATION OF JURISDICTION CERTIORARI – DCA 3, which set forth the facts and law of the case and recommended denying the Writ of Certiorari. A line was drawn through the pages of this document.

Further, in the record, there appeared another document entitled DETERMINATION OF JURISDICTION ON RE-ASSIGNMENT. This document recommended the granting of the Writ of Certiorari without oral argument and was dictated by Justice McCain.

The record indicates Certiorari was granted without oral argument, Appellant's appeal was reinstated and remanded to the District Court of Appeal, Third District, for further proceedings.

10. Case No. 45,356 was also assigned to Justice McCain. This is the same GOODMAN – OLSEN case appealed the second time. Although the court records reflect Leo Greenfield to be the Attorney for the Appellant, the Court files contain pleadings with Frank Ragano's name as co-counsel for Appellant.

11. The assignment of cases to Justices of the Florida Supreme Court is done on a random selection basis as per the Court rules and is assigned after each case matures. Each Justice should get every seventh case. Justice McCain gained control over the first GOODMAN – OLSEN case by reassignment from another Justice which is an unusual and irregular procedure. I had not completed investigation of how Justice McCain gained control of the second case prior to his resignation from the Court.

12. There is in the record of the impeachment proceedings the uncontroverted testimony of Sid White, Clerk of the Florida Supreme Court, that Justice McCain requested the assignment of several cases to him, that he could not recall all of the requests or if the GOODMAN - OLSEN case had been requested. Further, he testified that requests for assignment of cases by Justices were uncommon and unusual.

13. On April 24, 1975, the Select Committee on Impeachment voted unanimously to recommend the impeachment of Justice McCain to the full House of Representatives and the Committee instructed the staff to draft Articles of Impeachment based on misfeasance, malfeasance and misdemeanor in office including but not limited to the following:

a. That Justice McCain used his judicial office to influence the outcome of decisions of the Supreme Court and other Courts of the State of Florida.

b. That Justice McCain solicited and received monies as and for campaign contributions or other unlawful compensation in violation of the laws of the State of Florida or of the judicial canons of ethics.

c. That Justice McCain showed bias and favoritism toward certain attorneys and certain litigants appearing before the Supreme Court and that he exploited his judicial office to render decisions or awards to the prejudice of the courts in violation of judicial canons of ethics and/or laws of Florida.

d. That Justice McCain has brought disgrace, disrepute and and damaged and jeopardized the image and reputation and independence and integrity of the Supreme Court of Florida and of the entire judicial system.

14. Upon the direction of the Committee, the staff

commenced the preparation of the Articles of Impeachment on Justice McCain for presentation to the House of Representatives of the State of Florida. Attached please find the first draft of the Articles of Impeachment against Justice McCain which were not acted upon nor released because of his resignation.

15. On April 28, 1975, Justice McCain submitted his resignation from the Supreme Court of Florida, which resignation was accepted by Governor Askew.

16. The resignation of Justice McCain ended the authority of the Select Committee on Impeachment and precluded further investigation into the GOODMAN – OLSEN cases.

17. Prior to the resignation of Justice McCain, Justice Dekle resigned. Further, the Committee, by a vote of 4 to 1 voted not to impeach Justice Boyd, but to refer him to the Florida Judicial Qualifications Commission for a mental examination and determination of capacity to continue to serve in office.

18. Further, Affiant sayeth not.

/s/MARC H. GLICK

Sworn to and subscribed before me this 29 day of May, 1975.

/s/ Dorothy R. Carroll
Notary Public
State of Florida at Large

My Commission Expires Sept. 12, 1975.

ARTICLES OF IMPEACHMENT
H. R. NO. _____
Select Committee on Impeachment

A RESOLUTION OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA PREFERRING ARTICLES OF IMPEACHMENT AGAINST DAVIS L. McCAIN AS A DULY COMMISSIONED AND ACTING JUSTICE OF THE SUPREME COURT OF THE STATE OF FLORIDA; PROVIDING FOR THE PRESENTATION OF ARTICLES OF IMPEACHMENT TO THE SENATE

OF THE STATE OF FLORIDA; REQUESTING THE TRIAL THEREOF; APPOINTING A COMMITTEE OF THE HOUSE TO MANAGE, PRESENT AND PROSECUTE ARTICLES OF IMPEACHMENT AT TRIAL BEFORE THE SENATE WITH OR THROUGH COUNSEL; AND PROVIDING FOR THE USE OF STAFF, THE EMPLOYMENT AND COMPENSATION OF LEGAL COUNSEL, CLERICAL HELP, INVESTIGATIVE PERSONNEL, OTHER EXPENSES OF CASE PREPARATION, TRIAL, SUBPOENAE AND COMPENSATION OF WITNESSES.

WHEREAS, a committee of this body of the 1975 Legislative Session, was appointed on February 10, 1975, by the Speaker of the House of Representatives to investigate charges of official misconduct of Justice David L. McCain of the Florida Supreme Court and make its report and recommendations to the House of Representatives, and

WHEREAS, said committee has performed its duties and by these articles files its report recommending that said justice be impeached, removed from office and disqualified from holding any office of honor, trust, or profit, NOW THEREFORE,

Be it Resolved by the House of Representatives of the State of Florida:

SECTION 1. That David L. McCain, a duly commissioned and acting justice of the Supreme Court of the State of Florida has been guilty of misdemeanor in office as a judicial officer of the State of Florida for which he, David L. McCain as Supreme Court Justice, should be and is hereby impeached of his office under Article III, Section 17, Constitution of the State of Florida; the acts so constituting misdemeanor in office of him, David L. McCain, as a judicial officer, being hereinafter more particularly set forth by way of separate articles of impeachment which are hereby found and voted against David L. McCain as a justice of the Supreme Court of the State of Florida by a vote of two-thirds (2/3) of all members present of the House of Representatives of the State of Florida, viz:

ARTICLES OF IMPEACHMENT

Articles of impeachment of the House of Representatives of the State of Florida in the name of themselves and all of the people of the State of Florida against David L. McCain who was heretofore elected, duly qualified, and commissioned to serve as a justice of the Supreme Court of the State of Florida.

ARTICLE I

Interference

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain, in violation of his constitutional oath to faithfully perform the duties as a judicial officer of the State of Florida and in violation of the laws of the State of Florida, or, in the alternative, of the code of judicial conduct and its predecessor the Cannons of Judicial Ethics, did on one or more occasions engage in conduct impairing and obstructing the proper administration of justice through attempts to improperly influence or subvert the outcome of decisions of cases pending in the courts of this state in favor of attorneys or litigants.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE II

Favoritism and Partiality

Using the power and authority of office while serving as a judicial officer of the Courts of the State of Florida, David L. McCain, in violation of his constitutional oath to faithfully perform the duties of a judicial officer of the State of Florida, and in violation of the laws of the State of Florida, or, in the alternative, the code of judicial conduct and its predecessor the Cannons of Judicial Ethics, has on one or more occasions shown bias, favoritism and partiality toward certain attorneys and certain litigants appearing in courts on which he was a judicial officer and thereby allowing such bias, favoritism, and partiality to significantly influence his decisions and judgments.

WHEREFORE, David L. McCain, by such conduct is guilty

of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE III

Unlawful Compensation

While serving as a judicial officer of the State of Florida, David L. McCain, personally, or in the alternative, by an agent acting in his behalf, did solicit and exact or, in the alternative, accept compensation other than that provided by law from one or more individuals, each such individuals being a litigant to a case that David L. McCain did, in his official capacity as a judicial officer of the State of Florida, make a judgment favorable to such party or parties.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE IV

Failure to Recuse

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain heard, considered and decided litigation in which he had an immediate interest and in which the outcome would have a direct effect on him.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE V

Campaign Contributions

Using the power and authority of office while serving as a judicial officer of the State of Florida, David L. McCain solicited campaign contributions from litigants and attorneys at the bar, who further were engaged in pending litigation before his court contrary to and in violation of the code of judicial conduct, and its predecessor the Cannons of Judicial Ethics.

WHEREFORE, David L. McCain, by such conduct in guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE VI

Financial Transactions

While a judicial officer of the State of Florida, David L. McCain did place himself in a compromising position and entered into financial and business transactions which could reflect adversely on his impartiality, interfere with the proper performance of his duties and involved him with attorneys and persons with pending litigation before the courts on which he served contrary to and in violation of the code of judicial conduct, and its predecessor the Cannons of Judicial Ethics.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE VII

Lowering the Esteem of the Judiciary

In his conduct as a judicial officer of the State of Florida, David L. McCain has by his infamy and the reasonable and probable consequences of the acts or conduct enumerated in Articles I through VI debased and degraded the office in which he serves and the court on which he sits into disrespect, scandal, disgrace, discredit, disrepute, and reproach to the prejudice of public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the integrity and impartiality of the State Judiciary placing a stigma thereon and rendering him unfit to continue to serve as a judge or public officer.

WHEREFORE, David L. McCain, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust or profit.

SECTION 2. That David L. McCain, as a Justice of the

Supreme Court of the State of Florida, be impeached of his office for misdemeanor in office.

SECTION 3. That the Speaker of the House of Representatives of the State of Florida shall appoint two (2) members of the House of Representatives as a House committee of managers. The Committee shall be known as: "The House Committee of Managers: Senate Impeachment Trial of Justice David L. McCain."

SECTION 4. That the House committee of managers be and they are hereby instructed to appear before the Senate of the State of Florida and at the bar thereof in the name of the House of Representatives, and all of the people of the State of Florida, to impeach David L. McCain for misdemeanor in office and to exhibit to the Senate the foregoing articles of impeachment against justice David L. McCain which have been agreed upon by this House and that the House committee of managers request that the Senate issue an Order for the appearance of David L. McCain before the Senate to answer to the articles of impeachment and demand his impeachment, conviction, removal from office, and disqualification to hold any office of honor, trust, or profit. And that it further request that the impeachment trial be open to the public and all media in the interest of respect for and trust in government and the people of the State of Florida.

SECTION 5. That the House committee of managers shall manage, present and prosecute, with or through counsel, the foregoing articles of impeachment at the trial thereof by the Senate.

SECTION 6. That the House committee of managers on the part of the House of Representatives of the State of Florida is hereby authorized and empowered to use staff, employ and fix compensation of legal counsel, clerical, investigative and other necessary assistance as they may require, and to incur such expenses as may be necessary in the preparation and conduct of the case to be paid out of the legislative expenses on vouchers approved by the House committee of managers.

SECTION 7. That the House committee of managers be and is hereby authorized to issue subpoenae and subpoenae duces tecum requiring appearance of witnesses and production

of documents in further preparation, and for the impeachment trial; such witnesses to receive compensation as provided by law.

APPENDIX H

SUPREME COURT
OF FLORIDA
Progress Docket

GOODMAN, SAUL
KEY NAME 43168
CASE NO
CERT. THIRD DCA DADE COUNTY
JURISDICTION
DEC. 18, 1972
DATE FILED
Opinion - 5/9/73
6-26-73 pet. for reh. denied

ATTORNEYS
Frank Ragano, Miami

ATTORNEYS
Messrs. Prunty, Ross, DeLoach and Olsen, Miami

PARTIES
SAUL GOODMAN,
Petitioner,
vs
RICHARD H. OLSEN,
Respondent.

DETERMINATION OF JURISDICTION - ORAL ARGUMENT

JUSTICE	DATE
F	JAN 9 1973
SCA	JAN 10 1973
B	JAN 12 1973
McC	JAN 30 1973 FEB 5 1973
HSD	
C	FEB 1 1973

DISPOSITION FEB 26 1973 To set w/o

ORAL ARGUMENT Set oral arg. for 3-5-73

JUSTICE	DATE
McC	APR 10 1973
F	MAY 1 1973
SCA	APR 30 1973
B	MAY 4 1973
HSD	MAY 7 1973
	To Bill Stamp 5-9-73

DISPOSITION

MOTION

JUSTICE	DATE

DISPOSITION

REHEARING 5-23-73

JUSTICE	DATE
McC	JUN 1 1973
C	JUN 11 1973
	JUN 22 1973
HSD	JUN 15 1973
B	JUN 4 1973
	Delay 6-22-73

DISPOSITION

JUSTICE	DATE
F	FEB 13 1973
SCA	FEB 19 1973
B	FEB 20 1973
McC	
HSD	FEB 15 1973

JUSTICE	DATE

DISPOSITION

DAY	MO	YEAR	ENTRIES
			Jur. fee paid
12	18	72	Petition for Writ of Certiorari
"	"	"	Petitioner's Brief & Appx
"	"	"	Transcript of Testimony Vols. I, II
"	"	"	Certified copies of Appeal Papers
Nov.	2	1973	Brief of Respondent
Nov.	2	1973	Letter of Jon W. Prunty, dated 12-29-72
Jan	8	"	Motion for Leave of Court to File Amended Petition for Writ
"	"	"	Amendment to Petition
"	"	"	Reply Brief in Support of Petition
Jan	26	"	Respondent's Supplemental Brief, etc. (DCA)
Jan	5	73	Order allowing Certiorari and Dispensing with oral argument - per cur.
3	19	73	Brief of Petitioner w/Appendix
3	23	73	Req. for oral argument
3	29	73	Respondent's brief & appendix
3	30	73	Supp. record
4	6	73	Reply Brief of Petitioner
May	9	73	Opinion (Mandate) Order of DCA quashed & cause remanded to DCA "directing that appeal be reinstated."
5	23	73	Petition for Rehearing
6	26	73	denied - mandate issued
			Respondent's motion to recall mandate

CASE NO. 43,168

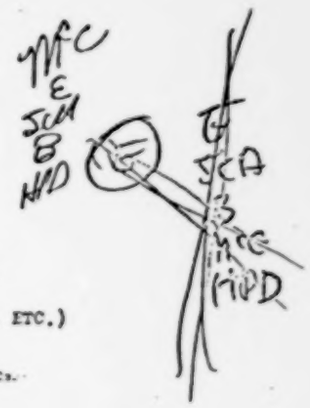
GOODMAN, SAUL,

Petitioner,

vs.

OLSEN, RICHARD H.,

Respondent.



REMARKS

(MOTIONS, PETITIONS, ETC.)

PETITION FOR REHEARING

Grant	Deny
B	

SAUL GOODMAN, petitioner,

v.

RICHARD H. OLSEN, respondent

CASE NO. 43,168

REMARKS

(ANY QUESTIONS, PLEASE STATE THEM.)

NOTE TO JUSTICES: It will be appreciated if each of the Justices will use this facing sheet, instead of the facing sheet of the attached opinion, to indicate his remarks or views he may have with respect to the opinion.

FOR FILING STAMP

FILE

MAY 9 1973

CHIEF JUSTICE

Use page attached, if necessary.

DETERMINATION OF JURISDICTION
CERTIORARI - DCA 3

SAUL GOODMAN -vs- RICHARD H. OLSEN No. 43,168

STATUS: Petition for writ of certiorari to DCA 3.

FACTS: On June 23, 1972, the Petitioner (plaintiff below) filed an appeal from the 11th Judicial Circuit Court orders dated March 16 and May 31, 1972.

On Sept. 28, 1972 the Respondent filed his brief on the merits of the appeal. On Oct. 19, 1972 the Respondent filed a motion to dismiss the appeal, arguing that the Petitioner had not filed his brief within the time allowed by the Appellate Rules.

On Nov. 2, 1972 the Petitioner filed a "Motion for Leave of Court to File Appellant's Brief" wherein he explained his delay in filing a brief and attaching an affidavit executed by his secretary. On Nov. 13 1972 oral argument was heard on this motion and Petitioner filed his brief as of that date.

On Nov. 17, 1972 the DCA 3 entered its order denying Petitioner's motion and granting Respondent's motion dismissing the appeal. It is from this order that Petitioner files his petition for writ of certiora

ISSUE: Whether Petitioner's allegation of conflict between the DCA 3 decision below and Hector Supply Co. Inc. v. Carter, 122 So.2d 22 3dDCA 1966, is a relevant consideration when the petition is presented under Art. V, Sect. 4, Fla. Const.

DISCUSSION: Art. V, Sect. 4, of the Fla. Const. provides in part:

> "The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, . . ."

Since Petitioner is alleging conflict between two DCA decisions, no jurisdiction can rest with this court under the petition as presented.

In his brief, Petitioner also cites Baker-Lewis Construction Co. v. Midyette, 141 So. 534, Fla. 1932, for the proposition that by failing grant Petitioner's motion, the DCA 3 abused its discretion. The facts

...1

in Baker reveal ". . . a course of indulgence between counsel as to the filing of briefs . . ." together with a voluntary stipulation as to the time when the opposing party's brief could be timely filed. In Baker, counsel met that stipulated deadline.

There is no conflict with Baker since there was no "course of indulgence" here and no adhered to stipulation between counsel as to timely filing.

RECOMMENDATION: Deny.

/c

...2

DETERMINATION OF JURISDICTION
ON REASSIGNMENT
FEBRUARY 5, 1973

STYLE: Goodman v. Olsen 843,168

STATUS: Conflict certiorari to DCA-3

FACTS: This involves a procedural matter and apparent conflict with decisions within the DCA-3, which by construction of new Article V, we have agreed is reviewable if there is conflict. (The petition was before us on effective date of Article V.)

Petitioner filed a timely notice of appeal with DCA-3 on June 23, 1972. Petitioner then failed to file a brief. On Sept. 20, respondent filed his brief on the merits, and on Oct. 19 filed a motion to dismiss. On Nov. 2 petitioner filed a motion for leave to file and explained his delay with supporting affidavits. On Nov. 13 oral argument before the DCA was held upon the motion. Petitioner filed his brief, at the court's suggestion on that date. On Nov. 17 the DCA denied petitioner's motion and granted respondent's motion to dismiss.

Conflict certiorari to us followed.

In Hector Supply Co. v. Carter, Fla. App. 1960, 122 So. 2d 22, (also a DCA-3), the appellant did not file his brief in conformity with the rules. Appellee filed his brief and in it also argued that the appeal should be dismissed. The DCA then ruled that since the appellee filed his brief first (not choosing to first file a motion to dismiss) then appellee's argument was untimely and the issues on appeal would be heard even though appellant had not filed a supporting brief.

Thus, the rationale of Hector gives us conflict. In both cases, appellants did not file briefs (sub judice, appellant did later file a brief), and in both cases the appellees filed briefs on the merits. In Hector, the appellee raised the issue of dismissal in his brief on the merits, whereas, sub judice it was raised by separate motion subsequent to appellee's filing of brief. This makes the case under review even stronger for conflict.

RECOMMENDATION: Grant certiorari and waive oral argument. The record is simple.*

* Without attempting to go to the merits, the record proper indicates a fairly strong case for petitioner, i.e. (1) no showing of prejudice to respondent due to petitioner's tardiness in filing brief, (2) internal mix-up between lawyers, and (3) brief was finally filed by petitioner.

DLS:w

APPENDIX I

SUPREME COURT
OF FLORIDA
Progress Docket

CONFIDENTIAL

Key Name
Case No. 45356

CERT. DCA-3 DADE COUNTY
Jurisdiction

APRIL 10, 1974
Date Filed

11-7-74 Opinion
Disposition

12-9-74
Petition for Rehearing Filed

1-29-75 denied
Disposition

ATTORNEYS
LEO GREENFIELD - North Miami

ATTORNEYS
PRUNTY, ROSS, DeLOACH & OLSEN
Miami

Parties
SAUL GOODMAN,
Petitioner,
vs
RICHARD H. OLSEN,
Respondent.

DETERMINATION OF JURISDICTION - ORAL ARGUMENT

JUSTICE	DATE
MEC	MAY 23 1974
NPD	
O	JUN 5 1974
SCA	JUN 12 1974
R	MAY 28 1974

MOTION

JUSTICE	DATE

ORAL ARGUMENT 9-13-74

JUSTICE	DATE
R	SEP 25 1974
C	OCT 4 1974
D	NOV 6 1974
MEC	9-16-74
BFO	OCT 7 1974

DATE FILED Month	Day	Year	ENTRIES 50759
4	10	74	Petition & attach.
	"		Transcript of Record
	"		Briefs
4	22	74	Respondent's Brief
	22		Transcript of Record
6	24	74	Certiorari Granted
7	19	74	Petitioner's Briefs on merits
7	22	74	Request for oral arg. on merits of Pet. application for writ
8	2	74	Certified Copies of Appeal Papers
8	2	74	Record (4 vols) & Exhibits
8	2	74	Resp. Briefs on the Merits
8	9	74	Reply Briefs on the Merits
11	7	74	Opinion (McCain) Cause reversed and rem for new trial.
11	14	74	Motion for ext. to file Pet. for Rehearing to and including 12-9-74 NFE (Resp
12	1	74	Petition for Rehearing
	"		Motion for Hearing En Banc
	"		Request for Oral Argument
12	16	74	Motion to Strike Request for Oral Argument and Motion for Hearing En Banc
	"		Reply to Petition for Rehearing
1	29	75	Pet. for reh. denied
3	6	75	Petition to stay Order, w affidavit in support
3	6	75	Order granting petition to stay to & including March 24, 1975 - further stay to be obtained from U.S. Supreme Court.

STYLE: SAUL GOODMAN v. RICHARD H. OLSEN

CASE NO: 45,356

REMARKS

NOTE TO JUSTICES: It will be appreciated if each of the Justices will use the listing sheet, instead of the attached opinion, to indicate his vote and any remarks or views he may have with respect to the opinion.

MAJORITY OPINION BY: McCain, J.

Concur	Dissent
R E B JCA	R - attached

PETITION FOR REHEARING

Grant	Deny
Q	Rec'd - Nov 7 1974 JCA

CASE NO. 45,356

SAUL GOODMAN,

Petitioner,

vs.

RICHARD H. OLSEN,

Respondent.

REMARKS

(MOTIONS, PETITIONS, ETC.)

PETITION FOR WRIT OF CERTIORARI

15" pen and

Grant	Deny
With Arg. / Without Arg.	

DETERMINATION OF JURISDICTION
CERTIORARI

STYLE: SAUL GOODMAN v. RICHARD H. OLSEN
Case No. 45,356

STATUS: Petition for writ of certiorari to the District Court of Appeal, Third District. 291 So.2d 71.

FACTS: On September 17, 1968, Goodman and Olsen entered into an investment contract related to a business venture. Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed to put up $300,000 of which Olsen would borrow $150,000, the total to be used to purchase 50,000 shares of Omega Equities, Incorporated. Each party was to own 25,000 shares, with Olsen's 25,000 shares pledged as collateral on the $150,000 loan from Goodman.

In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

Olsen also agreed not to sell any of his shares prior to December 31, 1969, without Goodman's prior written consent unless all of his obligation to Goodman in the venture were satisfied. Further, Olsen agreed to take out a $400,000 life insurance policy payable to Goodman, with Olsen paying the premiums, such policy to remain in good standing until the conclusion of the agreement.

The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration, at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

On September 18, 1968, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000. Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman. Olsen failed to repay the balance due on the $150,000 loan when due on May 13, 1969, and failed to buy back the Omega shares pursuant to the contract.

Petitioner commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1968, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his Answer the affirmative defense of usury. After a jury trial, petitioner moved for directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from whom he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the lender. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed Motion for Judgment in Accordance with Motion for Directed Verdict; or in the Alternative, For A New Trial, both of which motions were denied by the trial court.

On appeal, the Third District Court affirmed per curiam with a series of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In State of Florida, Ex Rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla.1963) and The Florida Bar v. Pitts, 219 So.2d 427 (Fla.1969), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

DISCUSSION: In the Delves case, involving a disciplinary proceeding, this Court held that the conduct of an attorney in furnishing a defective instrument to laymen from whom the attorney obtained a substantial loan and in thereafter filing his affidavit in a suit by laymen to enforce the note, charging that the note was usurious and at least partially unenforceable, warranted suspension. Delves had raised the affirmative defense of usury when suit was filed to enforce payment of the note. In deciding to increase the punishment of reprimand ordered by the Board of Governors of the Florida Bar to a twelve month suspension, the court quoted from the judgment:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be the condition to reinstatement. The Delves case was cited with approval in Pitts, supra.

Petitioner contends that the principle laid down in Delves and supported by the Pitts case estops the attorney-defendant being sued on a note from claiming usury as a defense as a matter of law; and further, that in the event such litigation reached a jury, it should be on appropriate instructions that the principle in the Delves case was in fact the controlling law.

Respondent contends that both Delves, supra, and Pitts, supra, are wholly and completely involved in a consideration and interpretation of the Integration Rule of the Florida Bar and have not the remotest relation to or similarity with any of the issues present in the case sub judice.

RECOMMENDATION: Grant Cert. Olsen, the respondent is a practicing attorney and the rationale of the foregoing cases clearly apply and justice requires evidence by the jury in usurious, contracts, etc.
Mac

ORAL ARGUMENT
FRIDAY, SEPTEMBER 13, 1974
FIVE BAR COURT
MAXIMUM OF FIFTEEN MINUTES TO THE SIDE

CASE NO. 45,356

SAUL GOODMAN,
Petitioner,
vs.
RICHARD H. OLSEN,
Respondent.

PRE-ARGUMENT ASSIGNMENT

mac

ORAL ARGUMENT
FRIDAY, SEPTEMBER 13, 1974
FIVE MAN COURT

STYLE: Saul Goodman v. Richard H. Olsen
Case No. 45,356

STATUS: Petition for writ of certiorari having been granted to the District Court of Appeal, Third District. 291 So. 2d 71.

FACTS: On September 17, 1968, Goodman and Olsen entered into an investment contract related to a business venture. Olsen, an attorney, prepared and wrote in his own hand a contract under the terms of which Goodman agreed to put up $300,000 of which Olsen would borrow $150,000, the total to be used to purchase 50,000 shares of Omega Equities, Incorporated. Each party was to own 25,000 shares, with Olsen's 25,000 shares pledged as collateral on the $150,000 loan from Goodman.

In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

Olsen also agreed not to sell any of his shares prior to December 31, 1969, without Goodman's prior written consent unless all of his obligation to Goodman in the venture were satisfied. Further, Olsen agreed to take out a $400,000 life insurance policy payable to Goodman, with Olsen paying the premiums, such policy to remain in good standing until the conclusion of the agreement.

The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

On September 18, 1968, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000. Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman. Olsen failed to repay the balance due on the $150,000 loan when due in May 1969, and failed to buy back the Omega shares pursuant to the contract.

Goodman commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1968, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his answer the affirmative defense of usury. After a jury trial, petitioner moved for a directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from who he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the lawyer. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed a motion for judgment in accordance with motion for directed verdict; or in the alternative, for a new trial, both of which motions were denied by the trial court.

On appeal, the Third District Court affirmed per curiam [illegible]

of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In Re: Florida, Ex Rel. The Florida Bar v. Belves, 160 So.2d 114 (Fla.1964) and The Florida Bar v. Pitts, 210 So.2d 227 (Fla.1968), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

DISCUSSION: In the Belves case, involving a disciplinary proceeding, this Court held that the conduct of an attorney in furnishing a defective instrument to laymen from whom the attorney obtained a substantial loan and in thereafter filing his affidavit in a suit by layers to enforce the note, charging that the note was usurious, and at least partially unenforceable, warranted suspension. Belves had raised the affirmative defense of usury when suit was filed to enforce payment of the note. In deciding to increase the punishment of reprimand ordered by the Board of Governors of the Florida Bar to a twelve month suspension, the court quoted from the judgment:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate, and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be a condition to reinstatement. The Belves case was cited with approval in Pitts, supra.

Petitioner contends that the principle laid down in Belves and supported by the Pitts case extends the rule beyond being used on a note from client by way of a defense to an action of law and suit, to that in the event such litigation is [illegible] it should be an appropriate instruction that the principle in the [illegible] case was in fact the controlling law.

Respondent contends that both Belves, supra, and Pitts, supra, are wholly and completely involved with the [illegible] and interpretation of the Integration Rule of the Florida Bar and not the [illegible] relation to or similarity with any of the issues [illegible] in the case [illegible] supra.

DECISION: Withheld pending oral argument.

The jury [illegible]

DETAILS: